G. Bouma Contractors, Inc. *and* Local 324, International Union of Operating Engineers, AFL-CIO. Case 7-CA-19096

May 18, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

Upon a charge filed on March 23, 1981, by Local 324, International Union of Operating Engineers, AFL-CIO, herein called the Union, and duly served on G. Bouma Contractors, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued a complaint on April 21, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding. Respondent filed no answer to the complaint.

With respect to the unfair labor practices, the complaint alleges in substance that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to make the required payments for the benefit of employees into the fringe benefit funds and file reports with respect thereto as required by the collective-bargaining agreement between the Union and Associated Underground Contractors, Inc., herein called the Association, an employer organization of which Respondent is a member.

On June 18, 1981, the General Counsel directed a letter to Respondent which served notice upon it that it had not filed an answer to the complaint and that it should do so. There was no response by Respondent to this letter.

On December 28, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on December 31, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.20 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, provides as follows:

> The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The complaint served on Respondent stated that, unless an answer was filed within 10 days from the service thereof "all of the allegations in the complaint shall be deemed to be admitted true and may be so found by the Board." As noted above, Respondent has not filed any answer to the complaint, nor has it responded to the Notice To Show Cause. No good cause to the contrary having been shown, in accordance with the rule set forth above, the allegations of the complaint are deemed admitted and found to be true. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Michigan. At all times material Respondent has maintained its principal place of business in Kentwood, Michigan, where it is engaged in the business of underground construction work.

During the year ending December 31, 1980, which period is representative of its operations during all times material hereto, Respondent, in the course and conduct of its business operations, purchased and caused to be transported and delivered at its Kentwood, Michigan, place of business goods and materials valued in excess of $50,000 directly from points located outside the State of Michigan.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within

the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Local 324, International Union of Operating Engineers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time operating engineers, mechanics, oilers and apprentice engineers employed by Respondent at its Kentwood, Michigan place of business, but excluding all other employees, guards and supervisors as defined in the Act.

The Association is an organization composed of employers engaged in the underground construction industry and which exists for the purpose, *inter alia*, of representing its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations including the Union in this proceeding. At all times material, Respondent has been an employer-member of the Association.

At all times since 1977, by virtue of successive collective-bargaining agreements between the Union and the Association, the current contract being by its terms effective from September 1, 1980, until September 1, 1983, the Union has been the exclusive collective-bargaining representative of the employees in the above-described unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

The collective-bargaining agreement between the Union and the Association provides, *inter alia*, for the payment by Respondent of moneys into various fringe benefit funds established for the benefit of employees of Respondent.

Since on or about September 1, 1980, Respondent has failed and refused to make the fringe benefit fund payments as required by the collective-bargaining agreement.

Since on or about March 4, 1981, the Union, in order to police the administration of the contract, requested that Respondent file fringe benefit reports for the months beginning September 1980 to date.

Since on or about March 4, 1981, Respondent has failed and refused to file fringe benefit reports despite the Union's request that it do so.

We, therefore, find that Respondent, by failing and refusing to make such fringe benefit fund payments and to file fringe benefit reports, has refused to bargain with the Union as the exclusive representative of its employees in the appropriate unit and has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

We have found that Respondent failed to make payments to and to file reports concerning fringe benefit funds in violation of Section 8(a)(5) and (1) of the Act. In order to dissipate the effects of this unlawful action, we shall order Respondent to make whole its employees by making the fringe benefit fund payments required by the collective-bargaining agreement[1] and by reimbursing its employees for any expenses ensuing from Respondent's unlawful failure to make such required payments as set forth in *Kraft Plumbing and Heating, Inc.*, 252 NLRB 891, fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). All payments to employees shall be made with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716

[1] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question of whether Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. *Merryweather Optical Company*, 240 NLRB 1213 (1979).

(1962).[2] In addition, we shall order Respondent to file the reports requested by the Union.

CONCLUSIONS OF LAW

1. G. Bouma Contractors, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 324, International Union of Operating Engineers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time operating engineers, mechanics, oiler and apprentice engineers employed by Respondent at its Kentwood, Michigan, place of business, but excluding all other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. By refusing on or about September 1, 1980, and at all times material thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, by failing and refusing to make payments to and to file reports concerning fringe benefit funds, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

5. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, G. Bouma Contractors, Inc., Kentwood, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 324, International Union of Operating Engineers, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time operating engineers, mechanics, oilers and apprentice engineers employed by Respondent at its Kentwood, Michigan place of business, but excluding all other employees, guards and supervisors as defined in the Act.

(b) Failing and refusing to make payments to and to file reports concerning fringe benefit funds established by the collective-bargaining agreement.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment.

(b) Make whole the employees in the appropriate unit by transmitting the payments owed to the fringe benefit funds pursuant to the terms of its collective-bargaining agreement with the Union and by reimbursing unit employees for any expenses ensuing from Respondent's unlawful failure to make such required payments, in the manner set forth in the section of this Decision entitled "The Remedy."

(c) File the fringe benefit reports requested by the Union.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(e) Post at its Kentwood, Michigan, place of business copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

[2] Member Jenkins would compute interest in accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 324, International Union of Operating Engineers, AFL-CIO, as the exclusive representative of the employees in the following appropriate unit:

All full-time and regular part-time operating engineers, mechanics, oilers and apprentice engineers employed by the Employer at its Kentwood, Michigan place of business, but excluding all other employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to make payments to and to file reports concerning fringe benefit funds established by the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described above, with respect to rates of pay, wages, hours, and other terms and conditions of employment.

WE WILL make whole the employees in the appropriate unit by transmitting the payments owed to the fringe benefit funds pursuant to the terms of our collective-bargaining agreement with the Union and by reimbursing unit employees, plus interest, for any expenses ensuing from our unlawful failure to make such required payments.

WE WILL file the fringe benefit reports requested by the Union.

G. BOUMA CONTRACTORS, INC.